

JAN 26 2009

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EARL V. LEVELS, SR.,

Plaintiff - Appellant,

v.

ASI/SBC,

Defendant - Appellee.

No. 06-15358

D.C. No. CV-02-05829-MEJ

MEMORANDUM \*

Appeal from the United States District Court  
for the Northern District of California  
Maria-Elena James, Magistrate Judge, Presiding \*\*

Submitted January 13, 2009 \*\*\*

Before: O'SCANNLAIN, BYBEE, and CALLAHAN, Circuit Judges.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The parties consented to the jurisdiction of the Magistrate Judge.

\*\*\* The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Earl V. Levels, Sr., appeals pro se from the district court's order denying his motion for relief from the judgment in his action against his former employer alleging discrimination on the basis of race, sex, and disability. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion the district court's denial of a Rule 60(b) motion. *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1005 (9th Cir. 2007). We affirm.

To the extent Levels's motion was based on excusable neglect pursuant to Fed. R. Civ. P. 60(b)(1), it was untimely, and the district court lacked jurisdiction to consider the merits of the motion. *See* Fed. R. Civ. P. 60(c)(1); *Nevitt v. United States*, 886 F.2d 1187, 1188 (9th Cir. 1989). To the extent Levels's motion was based on the catch-all provision of Rule 60(b)(6), he failed to demonstrate "circumstances beyond his control that prevented him from proceeding with the prosecution ... of the action in a proper fashion." *Cnty. Dental Serv. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002). Accordingly, the district court did not abuse its discretion by denying the motion.

**AFFIRMED.**